UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JAN OLEKSIAK, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Docket No. 96-330-P-C***
	)	
DOWN EAST ENERGY CORP.,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The defendant, Down East Energy Corp. ("Down East"), moves for summary judgment on Counts V and VI of the complaint in this action arising out of a spill of heating oil at the plaintiffs' residence. Count V asserts a claim under the Oil Pollution Act ("OPA"), 33 U.S.C. § 2701 *et seq.* Count VI seeks a declaratory judgment that Down East is liable for contribution under OPA for any damages caused to third parties by the spill. I recommend that the motion be granted.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved

favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc*., 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give the party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Assn. of Machinists & Aerospace Workers v. Winship Green Nursing Ctr*., 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The summary judgment record reveals the following undisputed facts. The plaintiffs purchased heating oil for their residence from the defendant from November 28, 1994 until May 29, 1996. Affidavit of Mark D. Lodge ("Lodge Aff.") (Docket No. 15)[1] ¶ 3; McDonald Aff.¶¶ 1-2. The

[1] Mr. Lodge's affidavit, like the only other affidavit submitted by the defendant (Docket No. 14), and the affidavit of plaintiff McDonald (Plaintiffs' Statement of Material Facts in Dispute ("Plaintiffs' SMF") (Docket No. 19, Exh. A)), is made on information and belief. Counsel should not need to be reminded of the requirement of Fed. R. Civ. P. 56(e) that affidavits submitted in (continued...)

heating system in the residence was not installed by the defendant. Lodge Aff. ¶ 6. A leak in the pipe running from the heating oil storage tank to the furnace in the residence was discovered on January 28, 1996. McDonald Aff. ¶ 15. The leak was reported to the Maine Department of Environmental Protection ("DEP"). *Id.* ¶¶ 16-17. Remediation work was performed on the property after the leak was discovered, and oil and oil-contaminated soil was recovered and removed. Deposition of D. Todd Coffin ("Coffin Dep.") at 22-23, 27-28, 39. The DEP's consultant estimated that 480 gallons of fuel oil were recovered. *Id*. at 11, 39.

The plaintiffs' property is located 2,000 feet from the ocean shoreline. *Id*. at 51. Immediately behind the house is a wooded area that is wet most of the year; it is drained by a culvert running under Route 88. McDonald Aff. ¶ 3. Plaintiff McDonald calculates that 670 gallons of fuel oil were lost through the leak. *Id*. ¶ 19.[2]

III. Analysis

Counts V and VI of the complaint are brought under or in relation to OPA. Count V seeks contribution, alleging that the plaintiffs are "responsible parties" within the meaning of OPA, 33 U.S.C. § 2701(32), "and are potentially liable for the costs of clean-up and damages for injuries to third parties." Complaint ¶ 72. Count VI seeks a declaratory judgment that the defendant is liable

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[1](...continued)
connection with a motion for summary judgment must be made upon personal knowledge. I rely on these affidavits only to the extent that they demonstrate the affiant's personal knowledge of the facts stated.

[2] The plaintiffs' Memorandum in Support of Objection to the motion for summary judgment (Docket No. 18) is replete with additional factual allegations that are not included in their statement of material facts in dispute and therefore may not be considered by the court. *Pew v. Scopino,* 161 F.R.D. 1,1 (D. Me. 1995).

for 100% contribution under OPA for any damages caused to third parties by the spill for which relief may be sought against the plaintiffs.

A responsible party for "a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines . . . is liable for the removal costs and damages . . . that result from such incident." 33 U.S.C. § 2702(a). The plaintiffs proceed here under OPA's provision for contribution. "A person may bring a civil action for contribution against any other person who is liable or potentially liable under this chapter or another law." *Id*. § 2709. Actions for contribution must be commenced no later than three years after "the date of judgment in any action under [OPA] for recovery of such costs or damages" or "the date of entry of a judicially approved settlement with respect to such costs or damages." *Id*. § 2717(f)(3). The complaint does not allege that any claims have been made against the plaintiffs under OPA by any third party.

The defendant argues that it is entitled to summary judgment on Count V of the complaint because the plaintiffs must prove that it is a "responsible party" under OPA in order to be entitled to contribution, and that the plaintiffs cannot establish that the defendant is a responsible party; that it is protected from third-party liability under 33 U.S.C. § 2703(a)(3) by its contractual relationship with the plaintiffs; and that the plaintiffs have not established that there has been a discharge of oil or the threat of a discharge within the meaning of 33 U.S.C. § 2702(a). The plaintiffs respond that the defendant could be found to be a responsible party under OPA; that the contractual defense protects the defendant only from direct liability, not from liability for contribution; and that they have provided evidence showing a substantial threat of a discharge into Casco Bay, which is a navigable water. Because the complaint does not allege that the defendant is a "responsible party" under OPA,

any argument that it could be a responsible party is beside the point. Section 2709 provides a private action for contribution from any person who is liable or potentially liable under OPA or any other law. The plaintiffs assert that the defendant is liable or potentially liable under Maine tort law.

In order to recover under OPA, the plaintiffs, who have submitted no evidence that there has been an actual spill of any of the oil from their residence into a navigable water, must first prove that there is a substantial threat of a discharge into such water as a result of the spill at their residence. They assert that they have submitted sufficient evidence on this point to avoid the entry of summary judgment. Memorandum in Support of Plaintiffs' Objection to Motion for Summary Judgment (Docket No. 18) at 4-5, 12-13. They rely on paragraphs 1-3 and 9 of their statement of material facts in dispute:

> 1. The swampy area behind the Plaintiffs' house is part of the navigable waters of the United States. (Affidavit of Mark McDonald)
> 2. The swampy area behind the Plaintiffs' house drains to Casco Bay. (McDonald affidavit; deed; subdivision plan)
> 3. The Plaintiff's [sic] house is located in the shoreline of both the swampy area behind their house and Casco Bay. (McDonald affidavit; deed)
> * * * * *
> 9. Oil remaining on Plaintiffs' property poses a substantial risk to navigable waters as that term is defined in OPA (McDonald affidavit; Eremita Deposition).[3]

Plaintiffs' SMF at 1, 2. The cited portions of the record do not support the factual assertions.

Plaintiff Mark McDonald's affidavit establishes only that there is a wooded area behind the

[3] In addition to the fact that paragraph 9 in Plaintiffs' SMF states a legal conclusion rather than a fact in dispute and is therefore inappropriate, the mere citation to "Eremita Deposition" without mention of a page number or numbers is insufficient. Exhibit E to Plaintiffs' SMF is 52 non-contiguous pages represented to be from the deposition of Peter Eremita, identified elsewhere as an environmental engineer employed by the DEP. Plaintiffs' SMF, Exh. D. The court will not search through the summary judgment record to find disputed factual issues. *See Pew*, 151 F.R.D. at 1.

residence "that is very wet most of the year. It drains to a culvert under Route 88. Our property is subject to a drainage easement. Our house is on filled land." McDonald Aff. ¶ 3. The deed, Exhibit F to Plaintiffs' SMF, establishes only that previous grantors in the plaintiffs' chain of title reserved an easement "to enter upon a twenty-five foot strip of land adjoining the rear line (the westerly line)" of their lot "for the purpose of installing, maintaining and repairing and/or replacing a land drain therein." The subdivision plan, Exhibit G to Plaintiffs' SMF,[4] shows no "swampy area," no indication of the location of Casco Bay, and certainly no direction of drainage of water. A careful review of the excerpts from the Eremita deposition provided by the plaintiffs shows only that he "observed discharge on the eastern side of the house [and] inferred that the groundwater flow was in that direction." Exh. E to Plaintiffs' SMF at 93. The drainage easement is to the west side of the property. At most, the Eremita deposition excerpt establishes that some oil was vacuumed off "the water table" in trenches dug outside the residence. *Id*. at 67. There is no evidence on this record that any oil from the plaintiffs' residence was in the groundwater outside their lot, that it is likely to get into the groundwater outside their lot in the future, or that that groundwater reaches any navigable water, even if the "swampy area" behind the plaintiffs' residence could reasonably be so described. The plaintiffs seek the benefit of inferences beyond those which the court is allowed to indulge in

[4] The defendant objects to the use by the plaintiffs in their opposition to its motion of "unauthenticated" documents. Reply to Plaintiffs' Objection to Motion for Partial Summary Judgment (Docket No. 21) at 2-3. Fed. R. Civ. P. 56(e) requires that all papers or parts thereof "referred to in an affidavit" be sworn or certified. The deed and site plan attached to Plaintiffs' SMF are not referred to in the McDonald affidavit. However, it is clear that Rule 56 anticipates that documents submitted in connection with a motion for summary judgment be of evidentiary quality. The copy of the deed submitted by the plaintiffs is stamped and dated by the Cumberland County Registry of Deeds, and the copy of the subdivision plan bears a handwritten notation concerning its receipt by the same registry. Neither is a certified copy as required for admission at trial. Fed. R. Evid. 1005. I consider both here only because, even if these document had been submitted in the proper form, the plaintiffs have failed to establish the necessary factual elements of their claim.

their favor.[5] The defendant is entitled to summary judgment on Count V.

This ruling on the underlying OPA claim requires entry of summary judgment as well on Count VI, which seeks declaratory judgment concerning the plaintiffs' entitlement to contribution from the defendant under OPA in the future. In addition, Count VI depends upon future events -- actions brought against the plaintiffs by third parties — that may never come to pass. The claim for declaratory judgment is thus unripe in any event. *Ernst & Young v. Depositors Econ. Protection Corp*., 45 F.3d 530, 537 (1st Cir. 1995).

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for partial summary judgment be **GRANTED** and that summary judgment for the defendant be entered on Counts V and VI of the complaint. Although neither of the parties has raised the issue, I also recommend that the court decline, pursuant to 28 U.S.C. § 1367(c), to exercise jurisdiction over the remaining claims in the complaint, all of which are based on state law, and that those claims be dismissed without prejudice.

NOTICE

[5] This conclusion is not changed by the language in *Avitts v. Amoco Prod. Co*., 840 F.Supp. 1116, 1122 (S.D.Tex. 1994), upon which the plaintiffs rely, holding that the "substantial threat" test was met by a large-scale surface or near-surface discharge in oil fields surrounding creeks that flow directly into a navigable bay on the Gulf of Mexico. The factual situation in *Avitts* is clearly distinguishable from the summary judgment record here. In any event, the *Avitts* decision was vacated on appeal on jurisdictional grounds, 53 F.3d 690 (5th Cir. 1995), and therefore has no force as precedent. *In re Daniel*, 771 F.2d 1352, 1361 (9th Cir. 1985).

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 9th day of June, 1997.

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David M. Cohen
United States Magistrate Judge